IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SCOTT FORDEN CORWIN,
Petitioner.

No. 2 CA-CR 2014-0355-PR
Filed November 19, 2014

Petition for Review from the Superior Court in Yavapai County
No. V1300CR820090220
The Honorable Jennifer B. Campbell, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Sheila Sullivan Polk, Yavapai County Attorney
By Dana E. Owens, Deputy County Attorney, Prescott
Counsel for Respondent

Law Offices of Michael P. Denea, PLC, Phoenix
By Michael P. Denea
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Scott Corwin seeks review of the trial court's order granting relief on his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. Corwin argues the court was not permitted to allow the state to withdraw from the plea offer on the basis that his sentence was illegal, but instead was required to impose a presumptive prison term consistent with governing law. We grant review but deny relief.

¶2 In 2010, Corwin pled guilty to aggravated luring of a minor for sexual exploitation, two counts of attempted aggravated luring, attempted sexual exploitation of a minor, and possession of methamphetamine. The offenses resulted from Corwin's interaction, in an online chat room, with an undercover police detective posing as a minor under the age of fifteen. The plea agreement designated all but the possession offense as dangerous crimes against children and provided Corwin would receive a seventeen-year prison term for aggravated luring. The trial court sentenced him consistent with the agreement and suspended the imposition of sentence on the other counts, placing Corwin on lifetime probation.

¶3 In 2012, Corwin filed a petition for post-conviction relief arguing that his seventeen-year sentence was improper because the victim was an undercover police officer and therefore the enhanced sentence for dangerous crimes against children did not apply. He argued the court was required to either "substitute" the five-year presumptive term for aggravated luring for his seventeen-year sentence or vacate his sentence and resentence him. He asserted the

court could not permit the state to withdraw from the plea because the state "bears the risk of the agreement."

¶4 Corwin acknowledged his petition was not timely filed, *see* Ariz. R. Crim. P. 32.4(a), but asserted he nonetheless could raise the claim because the illegal sentence was "void." He further claimed he was entitled to file a late petition pursuant to Rule 32.1(f) because he had only recently discovered "that he had received ineffective assistance of counsel or that his plea agreement was based on a mistake of law by the prosecutor," based on *State v. Regenold*, 227 Ariz. 224, 255 P.3d 1028 (App. 2011). In that case, we determined that, when the defendant was convicted of luring a minor for sexual exploitation, the sentence enhancement for dangerous crimes against children did not apply when the victim was not an actual child. *Id.* ¶¶ 4-10.

¶5 In response, the state argued Corwin's claims were precluded as untimely. In the alternative, although the state agreed Corwin's seventeen-year sentence was improper, the state asserted the sentence was "integral" to the plea agreement and it should be permitted to withdraw from the agreement. Corwin argued in reply that his claim was not precluded because it was of sufficient constitutional magnitude to require his personal waiver. He additionally argued the claim was not "indefinitely precluded" because he eventually would be permitted to raise the claim pursuant to Rule 32.1(d). Concluding the "purpose of the plea agreement" had been "complete[ly] frustrat[ed]," the trial court granted relief and "reject[ed] the plea agreement in its entirety." The court did not address the timeliness of Corwin's claim.

¶6 On review, Corwin argues the trial court was not permitted to allow the state to withdraw from the plea agreement, asserting the state "bore the risk that the sentencing provisions it was enforcing could have been construed as inapplicable and unenforceable as to [him]." We need not address this argument, however, because Corwin's petition was patently untimely.

¶7 Rule 32.4(a) permits claims pursuant to Rule 32.1(d) through (h) to be raised in an untimely proceeding. Although

Corwin argued below he could raise this claim pursuant to Rule 32.1(f), he is mistaken. Corwin asserted he had only recently become aware that his trial counsel had been ineffective. Rule 32.1(f) allows an untimely proceeding where "[t]he defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part." But that provision does not apply when, as here, the defendant has not claimed to be "unaware of [the] right to petition for post-conviction relief" but instead, "based on information that later came to light, [the defendant] regretted having failed" to file a timely Rule 32 proceeding. *State v. Poblete*, 227 Ariz. 537, ¶ 7, 260 P.3d 1102, 1104-05 (App. 2011). In short, Corwin's eventual conclusion that he might have a viable claim does not permit him to bring that claim in an untimely proceeding.

¶8 Nor will Corwin's claim become viable pursuant to Rule 32.1(d), as he argued below. A claim that a sentence is illegal is cognizable under Rule 32.1(c) and must be brought in a timely proceeding. Rule 32.1(d), in contrast, provides a ground for relief when "[t]he person is being held in custody after the sentence imposed has expired." But Corwin's seventeen-year sentence, even if improper, will not expire until he has served the entire term. Stated differently, Rule 32.1(d) could only apply after Corwin served his full sentence.

¶9 Corwin further asserted he could raise the argument in an untimely petition because it is of sufficient constitutional magnitude to require personal waiver, citing *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). But in *State v. Lopez*, we determined that in an untimely post-conviction proceeding like this one, a claim not falling within Rule 32.1(d) through (h) was barred irrespective of whether a defendant had knowingly, voluntarily, and intelligently waived it and, therefore, *Stewart* did not apply to claims raised in a post-conviction proceeding that had not been timely initiated pursuant to Rule 32.4(a). 234 Ariz. 513, ¶¶ 6-8, 323 P.3d 1164, 1166 (App. 2014).

¶10 Finally, to the extent Corwin suggests he may challenge the legality of his sentence at any time because it is void for lack of

jurisdiction, he is mistaken. In *State v. Bryant*, we explained, "Subject matter jurisdiction is 'the power of a court to hear and determine a controversy.'" 219 Ariz. 514, ¶ 14, 200 P.3d 1011, 1014 (App. 2008), *quoting Marks v. LaBerge*, 146 Ariz. 12, 15, 703 P.2d 559, 562 (App. 1985). We thus "conclude[d] that we used the word 'jurisdiction' imprecisely" in previous decisions and stated that "when the trial court has jurisdiction over the subject matter and parties," its judgment, "even if voidable and erroneous, [can] only be modified on appeal or by proper and timely post-judgment motion." *Id.* ¶¶ 13, 15, 17.

¶11 The trial court here plainly had jurisdiction to sentence Corwin. *See id.* ¶ 17. And he has forfeited any challenge to the legality of that sentence by failing to raise it in a timely proceeding.[1]

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[1]Corwin argues that we lack "subject matter jurisdiction to consider any argument not raised in a cross-petition," citing *State v. Dawson*, 164 Ariz. 278, 792 P.2d 741 (1990). There, our supreme court concluded an appellate court lacked jurisdiction to consider and correct an illegally lenient sentence absent a cross-appeal filed by the state. *Id.* at 280-81, 792 P.2d at 743-44. But the defendant in *Dawson* had not placed his sentences at issue, and thus whether his sentences were proper was entirely independent of the issues raised on appeal. Assuming, without deciding, that the jurisdictional discussion in *Dawson* has any application to the review of post-conviction proceedings, Corwin has placed the propriety of his sentence squarely before the court. Thus, whether he was entitled to bring that claim is also necessarily before us. In any event, because policy dictates that we will not punish Corwin for seeking review, we do not alter the trial court's grant of relief. *Cf. State v. Monick*, 125 Ariz. 593, 595, 611 P.2d 946, 948 (App. 1980) (rejecting state's argument that entire sentence should be set aside due to restitution error because that could "punish appellant for exercising his constitutional right to appeal"). And the state has not requested that we do so, instead arguing only that we should deny review because Corwin's claims are precluded. *Cf.* Ariz. R. Crim. P. 32.2(c) ("[A]ny court on review of the record may determine and hold that an issue is precluded regardless of whether the state raises preclusion."); *Town of Miami v. City of Globe*, 195 Ariz. 176, n.1, 985 P.2d 1035, 1036-

See Ariz. R. Crim. P. 32.2(b), 32.4(a); *cf. State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (claims of illegal sentence subject to preclusion under Rule 32.2(a)(3)).

¶12 For the reasons stated, although review is granted, relief is denied.

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37 n.1 (App. 1998) ("When a successful party seeks only to uphold the judgment for reasons supported by the record, but different from those relied upon by the trial court, its arguments may not be raised by a cross-appeal, as it is not an 'aggrieved' party, but are more properly designated as cross-issues.").